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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMES EARL SPIVEY, Defendant and Appellant.	D038028 (Super. Ct. No. SCE 204300)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

A jury convicted James Earl Spivey of voluntary manslaughter as a lesser included offense within a charged murder, with a true finding of personal firearms use. Spivey appeals, arguing (1) it was an abuse of discretion for the trial court to have imposed the upper term for the firearms use enhancement because the firearms use herein was only of an ordinary variety, and (2) it was error to have instructed the jury pursuant to CALJIC No. 17.41.1, which assertedly infringed upon the jury's deliberative process and deprived Spivey of a fair trial. Finding neither argument meritorious, we affirm.

FACTUAL BACKGROUND[1]

A. August 3, 1999-March 21, 2000

University Place is a small cul-de-sac in La Mesa. Spivey, who lived alone, had moved into 8024 University Place about five years before August of 1999. The neighbors across the street, at 8050 University Place, Mr. And Mrs. John Gonzalez and their adult child, John Gonzalez, Jr., had resided in the University Place cul-de-sac 10 or 15 years. Another child, Kathy, moved out on marriage.

Late in the evening of August 3, 1999, Spivey came outside while John Gonzalez, Sr., 74, was working outside on a motor home. In the ensuing argument, Spivey, who had spent 12 years in the Marine Corps and served in Vietnam, hit Mr. Gonzalez on the back of the head. Spivey kept swinging at Gonzalez, the two fell to the ground, and Mr. Gonzalez was cut by concrete. The Gonzalez family called 911, but responding officers deemed the matter mutual combat, and made no arrests.

For the next few months, matters went rapidly downhill. John Gonzalez, Jr. and his sister Kathy verbally abused Spivey after the attack on John Sr., and Spivey installed security floodlights which were very bright, on most of the time, and were pointed at the Gonzalez' home. Spivey's next door neighbor, who had earlier gotten a restraining order against Spivey, had the restraining order served on Spivey by John Jr. Also, on the night of March 21, 2000, John Sr. entered Spivey's yard and reset the floodlights to illuminate Spivey's yard, rather than the Gonzalez' home.

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1 As there is no claimed evidentiary insufficiency, we abbreviate factual recitations.

B. March 23, 2000

On the evening of March 23, 2000, Kathy Gurling and her husband Dennis, along with Kathy's son Anthony, were at the Gonzalez residence helping John Sr. and his wife pack a moving van, as they were moving to Las Vegas. John Jr., who had had two back surgeries and had limited mobility, was unable to help pack. At about 6:45 p.m., when Dennis and Anthony had almost finished the packing, John Jr. came out of the house on his way to the store to get some snacks.

As John Jr. moved off, he yelled "hey, put your lights down," and someone in the street yelled back "hey, fuck you." John Jr. moved towards the street, but then turned around and yelled that Spivey had a gun. John Jr. then ran between the moving van and a pickup truck. Spivey shot him, and John Jr. yelled out he was hit. Spivey fired several more shots, and John Jr. called out once more before his voice trailed off. Dennis Gurling ran after Spivey, who ran back into his house. John Jr. died.

John Jr. had sustained a pattern of multiple small injuries in the area of his right buttock and thigh.[2] Two other bullets had also entered John Jr.'s back and traveled downwards, with one of them going through one lung, the heart and the diaphragm, coming to rest in John Jr.'s stomach. This, of the two bullets in the back of John Jr., was the fatal one. The characteristics of the wounds indicated John Jr. had probably been on his hands and knees when these shots were fired by Spivey.

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[2] The Smith & Wesson .357 magnum Spivey used contained one round of "snake shot" and five regular .357 rounds. When the gun was found in Spivey's living room it had five casings and one unexpended cartridge, probably a misfire.

Defense

Spivey claimed that on the night in question John Jr. had trespassed upon his property and threatened him, whereupon Spivey picked up his .357 and went to the door, holding it behind his back. According to Spivey, he pulled the gun up and pointed it at John Jr. only after John Jr. had charged at him. When John Jr. turned and ran away, Spivey ran after him and fired shots to "neutralize" him. Spivey claimed he fired a final shot only after John Jr. turned and lunged at him.

PROCEDURAL BACKGROUND

By information filed May 3, 2000, the District Attorney of San Diego County accused Spivey of murder with firearms use. On October 31, 2000, a jury acquitted Spivey of first degree murder, but could not agree on second degree murder, and a mistrial was declared.

On April 6, 2001, a second jury acquitted Spivey of murder, but found him guilty of the lesser included offense of voluntary manslaughter. The jurors also found true the personal firearms use allegation.

On May 7, 2001, after consideration of the probation report and both sentencing memoranda, Spivey was sentenced to a term of 16 years in state prison, comprised of the six-year middle term for manslaughter, and the 10-year upper term for the personal use of a firearm. Timely notice of appeal was filed.

STANDARD OF REVIEW

A sentencing choice is reviewed under a highly deferential standard: "Sentencing choices . . . are reviewed for abuse of discretion. . . . A court abuses its discretion

'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

Assertions of instructional error, however, are reviewed de novo: "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

DISCUSSION

I

UPPER TERM FOR FIREARMS USE

A. Proceedings at Sentencing

In a statement in aggravation and at the sentencing, the prosecutor argued for the upper term for the substantive offense and the firearms use. In a statement in mitigation and at the hearing, counsel for Spivey requested the lower term in each case, adopting the recommendations of the probation report to that effect.[3] (While the probation report had noted the factors in mitigation supporting selection of the lower term for the substantive offense, the probation report is barren of any analysis whatsoever supporting imposition of the lower, rather than the middle or upper, term for the firearms use enhancement.)

The court first denied probation because Spivey had "gunned down an unarmed man in front of his own home." Finding the asserted mitigating factors of duress and

provocation to have little weight, while Spivey's lack of prior criminal history was however sufficient to balance the aggravating factors of the degree of violence and the unarmed victim's vulnerability, the court imposed the middle term of six years for the voluntary manslaughter conviction. The court also stated it did not consider the firearms use in determining the appropriate term for the manslaughter conviction.

As to the firearms enhancement, the court stated he agreed generally with the analysis of the question put forward by the prosecutor: lower term gun use would be the "flashing" or display of the weapon, while the middle term would be appropriate where the gun was used in some fashion in committing the crime, but where no great physical harm resulted from such "ordinary" use, and "[u]pper term is where the gun is used [and] great bodily injury or death is inflicted. And in this case, the weapon was fired six times -- three times hitting Johnny Gonzalez. If there is a more aggravated use of a firearm, I'm not aware of it." The court made this determination not with respect to the underlying offense of homicide, but stated that "[t]he [firearms use] upper term rests totally upon the way and the manner in which this firearm was used . . . . "

B. Analysis

Spivey argues (1) imposing the upper term for gun use to inflict a death in a case where there is also a conviction of a killing is a failure to exercise discretion, (2) the court erred in not finding the gun use herein to be "ordinary" rather than aggravated, and (3) the court failed to properly weigh mitigating factors, including Spivey's Vietnam military

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3 While the Attorney General asserts the matter was not preserved for appeal, we find Spivey's challenge to the term selected to be sufficiently preserved for our review.

service and his productivity as a member of society. We cannot agree with these assertions of sentencing error.

As the Attorney General points out, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.) As the *Alvarez* court also went on to note, "'[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*Id*. at p. 978.)

With respect to Spivey's argument his gun use was subsumed in the manslaughter conviction, we cannot agree. Use of a firearm is not necessary to accomplish a homicide, and conversely, the victim need not even see a firearm (and necessarily need not be the recipient of a projectile from the firearm) in a case where "use" of a firearm is otherwise established. (See, e.g., *People v. Dominguez* (1995) 38 Cal.App.4th 410, 421-422.) In this case, where the sentencing judge explicitly disclaimed reliance on the substantive conviction in determining the proper term for the gun enhancement, there was no dual use of facts nor abandonment of discretion in imposing the firearms enhancement.

As to finding the use here to be aggravated, rather than ordinary, there was no abuse of discretion. Firing of the weapon and resultant injury from such firing is not necessary for a finding the upper term is appropriate: "The manner in which he used the

gun clearly involved the threat of great bodily harm, which, contrary to [appellant's] argument, is a factor legally sufficient to justify imposition of the upper term. [Citation.] In any event, the record also reflects other aggravating factors, any one of which is sufficient to justify imposition of the upper term . . . ." (*People v. Douglas* (1995) 36 Cal.App.4th 1681, 1691-1692; *People v. Zamarron* (1994) 30 Cal.App.4th 865, 872.)[4] Necessarily, the propriety of imposition of the upper term for firearms use is even more well supported on the facts of the present matter.

In *People v. Brown* (2000) 83 Cal.App.4th 1037, 1044, the appellate court, in response to an assertion the upper term for firearms use was improper, observed that "the trial court noted [appellant] used the handgun repeatedly—she shot [the victim] four times—and inflicted great bodily injury on him. The trial court did not abuse its discretion in sentencing defendant to the upper term for the firearm use enhancement."[5] The facts of the present case, where death resulted, necessarily require that we uphold the sentencing choice here at issue: "Applying the extremely deferential and restrained standard by which appellate courts are bound in these matters, we find the trial court did not abuse its discretion. Whatever conclusions other reasonable minds might draw, on balance we find the decision tolerable given the court's broad latitude." (*People v.*

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4 See also *People v. Osband* (1996) 13 Cal.4th 622, 730: "[A] single factor in aggravation suffices to support an upper term."

5 Appellate counsel repeatedly asserts the court's consideration of the fact death resulted from the firearms use herein meant that the court's discretion was not in fact exercised. We do not so read the record.

Superior Court (*Alvarez*), *supra*, 14 Cal.4th at p. 981.)[6] That holding applies to this case also. Further, there is no reasonable probability of another result on remand, which thus would be an idle act. (See. e.g., *People v. Douglas*, *supra*, 36 Cal.App.4th at p. 1692.)

II

CALJIC NO. 17.41.1

The trial court, without objection by Spivey's counsel, instructed the jury using CALJIC No. 17.41.1, which provides: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of this situation."

Spivey now contends the instruction violated his rights to a jury trial, due process and a unanimous jury verdict by infringing on the secrecy of jury deliberations, by stifling freedom of expression and debate in the jury room, and by allowing majority jurors to wield undue pressure on dissenting jurors and thereby coerce a unanimous verdict.[7] On this record, these arguments have no merit.

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6 Spivey's argument his Vietnam service was not given proper weight is a proper point for the trial court, but the trial court's determination of the weight to be accorded this and other factors is subject to our review for abuse only, which we cannot find here.

7 Although the issues raised here are pending before the California Supreme Court (see *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Engleman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462; and *People v. Metters* (1998) 61 Cal.App.4th 1489, review granted

At the outset of our analysis we note the jury did not ask any questions regarding the challenged instruction, nor did any juror report any alleged misconduct to the court. There was, as we noted previously, no objection to the instruction at trial, thus we have absolutely no information in this case as to how the instruction might possibly have impacted Spivey's right to a jury trial. We are left to speculate with Spivey as to how, in the abstract, the instruction might have the deleterious effects he now asserts.

Dealing generally with the instruction, it is clear that jurors do have a duty to follow the law and to decide cases in accordance with the proper principles. (*People v. Williams* (2001) 25 Cal.4th 441.) Jurors are not permitted to consider penalty or punishment, to allow passion or prejudice to influence their decisions or to attempt to nullify the law by refusing to fairly apply it. (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1707; *People v. Fernandez* (1994) 26 Cal.App.4th 710, 714-716; *People v. Dillon* (1983) 34 Cal.3d 441, 487.) Thus, viewed in the abstract, there is nothing wrong with the general principles cited in the instruction.

Spivey points to that portion of the instruction which directs jurors to inform the court in the case of possible violations of the instructions by any of the jurors. It is argued that such direction could interfere with the secrecy of deliberations. However, there is nothing in the instruction requiring jurors to report "holdouts" or those who disagree with the majority or to tell the court about their individual thought processes during deliberations. Rather, as noted above, the instruction merely reminds the jury of its duty to decide the case based on the evidence presented at trial and the law as

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June 10, 1998, S069442), we address them pending resolution of such issues by the high

instructed by the court and to bring to the court's attention any outright abuse of such duty. Even assuming that a possibility exists in the abstract that such direction could interfere with the secrecy of deliberations, there is nothing in this record to even remotely suggest that such interference might have occurred here.

Moreover, we cannot find a sound basis on this record for Spivey's argument the instruction denied him a unanimous verdict because it could lead a juror who disagrees with the majority to yield his or her position for fear of incurring judicial wrath. Rather, the jurors were told to view the instructions as a whole and not to single out any one of the instructions. (CALJIC No. 1.01.) They were told not to "take a cue from the judge," to make their own decisions and to render their individual verdicts, even if such would be at odds with the majority. They were also informed of their duty to follow the law. (CALJIC No. 1.00.) Those instructions were proper, and in the absence of anything in the record to indicate the jurors misunderstood their duty to follow the instructions, including holding their individual opinions, we are entitled to assume the jurors complied with them. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-527; *People v. Jenkins* (1994) 29 Cal.App.4th 287, 297.) Accordingly, we are at a loss to understand how one instruction, in a total package of instructions, which tells the jurors to follow the rules and to advise the court only if a juror refuses to follow the instructions, can be held to deprive the defendant of the right to a unanimous verdict.

Spivey simply has not shown how such instruction deprived him of his right to a fair jury trial or infringed upon the jury's deliberative process. Nor has he provided any

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court.

evidence to indicate the instruction somehow intimidated any of the jurors in this case. Under these circumstances we cannot find that CALJIC No. 17.41.1 is either intrusive or coercive in this case. (Cf. *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1444, 1446, fn. 2; *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1137-1138.)

To the extent there was any error in the scope of the instruction, however, such error was plainly harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.